

American Cyanamid Company and Frank X. O'Donnell. Case 22-CA-16456

January 18, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 25, 1990, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response and in support of the judge's decision.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

The complaint alleged and the judge found that Charging Party O'Donnell was discharged in violation of Section 8(a)(1) of the Act because he had engaged in protected concerted activities. The Respondent excepts to the judge's finding and asserts that O'Donnell, who was a pilot for the Respondent, was discharged, inter alia, for insubordination and failure to specify alternative landing fields in his flight plans.

In *Wright Line*,³ the Board set forth its test of causation for cases alleging violations of the Act that turn on employer motive. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The judge found, and we agree, that the General Counsel established a prima facie case. Charging Party O'Donnell had been the key spokesperson for the Respondent's line pilots at meetings with the Respondent's management regarding various terms and conditions of employment. The Respondent's officials ex-

pressed annoyance at O'Donnell's participation as well as at the pilots' concerted action. O'Donnell was discharged a week after the last meeting between the pilots and management. He was told that he was being discharged because he did not agree with the way the Respondent ran its operation. Thus, the timing and circumstances of O'Donnell's discharge warrant an inference that O'Donnell's protected concerted activity was a motivating factor in the Respondent's decision to discharge him.

Having examined the Respondent's defense, the judge concluded that the evidence proffered by the Respondent did not establish that O'Donnell would have been discharged in the absence of his protected activity. We agree.

The Respondent offered various reasons for O'Donnell's discharge on February 10, 1989. Its Director of Flight Operations Denny, who had made the decision to terminate O'Donnell, testified that O'Donnell was discharged because of insubordination and that the "final straw" was its discovery, in February 1989, of deficiencies in three of O'Donnell's flight plans for December 1988. Denny also testified that O'Donnell was insubordinate when he refused to take quizzes that the Respondent required of all pilots, and to minor incidents of insubordination since then. The issue regarding the quizzes was resolved, however, 7 months before O'Donnell's termination⁴ and Denny did not elaborate regarding the minor insubordination. The Respondent argues that O'Donnell for years had failed to designate an alternative airport on his flight plans and that this had been specifically discussed with him many times. Assuming for the sake of argument that the failure to designate alternative airports was an ongoing problem, we note that it was one that the Respondent had tolerated for years. The Respondent has not explained why this alleged failing had suddenly become the basis for O'Donnell's discharge.

The Respondent also relied on other problems with O'Donnell. Its major complaints were that O'Donnell had improperly started a jet engine and taxied from a hanger in December 1985, that O'Donnell had improperly handled a flameout in 1984, and that O'Donnell, as a passenger, had changed his travel arrangements without authorization while on company business in 1985. These isolated incidents, however, occurred several years prior to O'Donnell's discharge and do not now furnish a persuasive basis for the discharge.⁵

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his analysis or discussion of the evidence.

³ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁴ After his initial reluctance to take the quizzes, O'Donnell agreed to take, and in fact took, the quizzes beginning in July 1988.

⁵ The Respondent also relied on O'Donnell's last performance review. This performance review was for 1986 and was dated February 1987. We have examined this document and find that it offers no support for the Respondent's defense. The performance review shows that O'Donnell was rated as meeting or exceeding the requirements for his position on most categories reviewed, as needing improvement in a few categories. It states that O'Donnell's work represented "a level of quality performance expected." We therefore conclude that O'Donnell was a satisfactory employee during the period under review. Further, contrary to any contention by the Respondent that O'Donnell was ter-

Continued

There is no evidence that O'Donnell was warned that his actions were jeopardizing his employment, except in regard to his refusal to take the quizzes.⁶ Supervisor Denny testified that although the Respondent did not have any set disciplinary procedure, the Respondent in the past had suspended employees without pay as a disciplinary procedure. Denny admitted that he had never suspended O'Donnell because of O'Donnell's alleged deficiencies.

Thus, in alleging that O'Donnell was discharged for legitimate reasons the Respondent relies on incidents that were stale at the time of discharge, and behavior that had been tolerated for a prolonged period of time—until O'Donnell engaged in protected activity.⁷ The Respondent failed to establish that other line pilots had been discharged for similar deficiencies.⁸ We therefore find, in agreement with the judge, that the Respondent has not carried its burden of demonstrating that O'Donnell would have been discharged in the absence of his protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Cyanamid Company, Teterboro, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

minated because of safety concerns, the performance review shows that one of O'Donnell's strengths was his active promotion of safe conditions and procedures.

⁶The Respondent placed in evidence memoranda from O'Donnell's personnel file regarding certain incidents that the Respondent claimed formed a basis for O'Donnell's discharge. The judge stated that none of these memoranda had ever been shown to O'Donnell. The record reveals that, contrary to the judge, some of these memoranda had been shown to O'Donnell and that the incidents recorded in the memoranda had been discussed with O'Donnell. As the memoranda contained no warnings that O'Donnell's actions were subjecting him to discipline, we find that the Respondent's showing them to O'Donnell is of little import.

⁷See *J. J. Cassone Bakery*, 288 NLRB 406, 410 (1988) (an employer's asserted legitimate reason for termination of an employee, tardiness, was rejected because, *inter alia*, the employer had tolerated the employee's pattern of arriving late over a long period of time without imposing any disciplinary action until the employee engaged in union activity).

⁸The Respondent presented testimony that it had discharged two other pilots for "poor performance," one before and one after O'Donnell's termination. The record does not reveal what the Respondent considered to be poor performance in those two cases. Further, the Respondent did not present any evidence that other pilots had been terminated for failure to list alternative landing fields.

Renee I. Crain, Esq., for the General Counsel.

Gerald Clendenny, Esq., for the Respondent.

Harry Greenberg, Esq. (Solomon, Richman, Greenberg & Stein, P.C.), of Lake Success, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Frank X. O'Donnell was discharged in violation of Section 8(a)(1) of the Act by Auxiliary Carriers Inc., a wholly owned subsidiary of American Cyanamid Company (Respondent) because he had concertedly complained to Respondent concerning wages, hours, and working conditions. Respondent contends that O'Donnell was discharged for insubordination and unsatisfactory work performance.

The hearing was held in Newark, New Jersey, on December 11 and 12, 1989. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel, for O'Donnell, and for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish, and I find, that Respondent is a corporation engaged in the business of manufacturing chemical products and that, in its operations annually, it meets the Board's nonretail standard for asserting jurisdiction.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates, through a wholly owned subsidiary, an air transportation service used by its corporate executives and on charters. Its planes are based at Teterboro airport in New Jersey. In late 1988 and early 1989, it had 12 line pilots and 2 pilots who were supervisors.

The Charging Party, Frank X. O'Donnell, was one of the more senior pilots. He had been working for Respondent since 1981 and, by late 1988, he was qualified to fly, and did fly, all types of aircraft that Respondent had.

On December 28, 1988, O'Donnell was at the house of Vaughn Crawford, another pilot. There were about eight pilots present then. They were there to discuss among themselves various matters, involving their work as pilots, with which they were dissatisfied. They discussed the fact that Respondent had hired several new pilots and paid them more than some of the experienced pilots. There were other concerns. They had scheduled that meeting in preparation for the monthly meeting that was to be held on December 30 with their supervisors. At the conclusion of the December 28 meeting, the pilots chose O'Donnell to be their spokesperson. The pilots had never previously held a meeting among themselves to discuss their concerns about working conditions.

On December 30, 1988, Respondent's director of flight operations, John Delmar Denny, and its chief pilot, Jack Ely Kemper, met with all the pilots at its facility in Teterboro airport. The first part of the meeting was taken up with a discussion of operational procedures. The meeting was then opened up for general discussion. At that point, O'Donnell stated that the pilots had met among themselves and had designated him to be the spokesperson. He touched upon a number of items—including charter work, reduction of paperwork, vacation leaves, and morale. At one point, Denny told him that he was doing a lot of talking. O'Donnell did not

bring up the subject of salaries. That subject was not mentioned at that meeting. The meeting ended with the understanding that the discussion of the pilots' concerns would resume at another meeting.

On January 27, 1989, most of the pilots met at Vaughn Crawford's house to go over the topics to be presented to Denny and Kemper. Within a few days thereafter¹ they convened briefly at a restaurant in Teterboro, New Jersey. One of the pilots, Michael Calabrese, had prepared a written agenda of topics. Each pilot was given at least one of those topics to talk about at a meeting set with Respondent later that day.

All the pilots were present that afternoon at Teterboro airport for the meeting with Denny and Kemper. It began with the usual discussion by Denny and Kemper about operational matters and then it was opened for other topics. The pilots presented their respective subjects. Their agenda consisted of requests for answers as to Respondent's holiday policy, compensation for charter flights on days off, sick days, evaluation forms, "Paper Trail," meal allowance policies, the policy whereby Denny or Kemper fly overseas instead of one of the line pilots, the high turnover of pilots in Respondent's employ, salary disparity, and miscellaneous items. The meeting lasted 6 or 7 hours, much longer than the usual operational meeting and, as it progressed, it became argumentative and the voices of the participants got louder. Denny, toward its end, asked the pilots if they wanted Respondent's director of headquarters services, William Wilson, to come down to talk with them. The pilots all responded as a chorus and in the affirmative.

On February 3, 1989, all the pilots were at Respondent's facility in Teterboro airport to meet with Wilson, Denny, and Kemper. Shortly after the meeting began, the salary issue was brought up. The discussion became strained. Wilson, at one point, stated that the pilots were talking as if this was a union shop. O'Donnell and Calabrese testified that Wilson also said that this was not a union shop and never will be. Wilson testified that he said that this was not a union shop. It is not necessary, in my view, to determine which account is correct.²

O'Donnell and Calabrese testified that Wilson also stated, with respect to the pilots' complaints as to the fact that new pilots were earning more than some of the experienced pilots, that maybe he ought to fire someone with a higher salary and hire somebody with a lower salary. Two of Respondent's witnesses testified that Wilson said that maybe he ought to fire all the pilots and hire them back with a higher salary.³ I credit the accounts of O'Donnell and Calabrese as firing a higher earning pilot was a way, albeit Draconian, of Wilson's finding room in his budget to give the lesser paid experienced pilots raises.⁴

¹⁰ Respondent's counsel, while questioning Denny, stated that the second meeting of the pilots with Denny and Kemper, took place on January 3. I accept instead the timeframe given in O'Donnell's account as it was not volunteered to him.

² If the Board concludes otherwise, I would accept the accounts of O'Donnell and Calabrese.

³ Another of its witnesses was asked a leading question as to that matter. I give the answer to that question no weight. Respondent's fourth witness, chief pilot Kemper, testified that Wilson had said that there is a possibility that someone may be hired in at a higher salary.

⁴ Incidentally, those pilots got raises in May 1989.

Toward the end of the meeting, O'Donnell questioned Wilson about Respondent's corporate philosophy and observed that other manufacturing companies have less pilot turnover.

The meeting was tense. The salary issue was still not resolved when it ended.

O'Donnell was not scheduled to work on February 4. He worked on February 5 and then was scheduled to be on leave until February 10.

O'Donnell testified as follows respecting the next development. On February 7 or 8 He received a telephone call at home from Denny telling him that his February 10 assignment was off and asking him to meet for lunch on February 10. O'Donnell accepted. On February 10, they had a drink and lunch during which they discussed certain matters of interest, including some of the items referred to above. After lunch had been served, Denny stated that it was over, that, as of that day, O'Donnell was terminated. Denny said that he felt bad about it but that O'Donnell should have no trouble finding work because of his qualifications. Denny also stated that O'Donnell was being terminated because he was not in agreement on how the operation is run.

Denny's account about his meeting on February 10 with O'Donnell is as follows. He called O'Donnell on February 9 and told him then that Kemper had gone back through records and "still found discrepancies regarding the selection of an alternate . . ." (The rest of the quote is confusing and apparently relates to some requirement that pilots are to specify alternate landing fields on certain flight plan forms). At the luncheon on February 10, he and O'Donnell discussed various subjects. He told O'Donnell that "the biggest problem in the flight department or one of the problems was (O'Donnell's) performance . . . and a continual violation of this specific item on the flight planning as well as his insubordination." He told O'Donnell that his employment was terminated, effective February 10.

I credit O'Donnell's account. It is more probable that Denny arranged to meet O'Donnell at lunch and to have a drink with him as a way of telling him as gently as he could that he was discharged. Denny's account is not persuasive as it seems unlikely that he would ask O'Donnell to lunch to tell him that he was the biggest problem in the flight department.

O'Donnell had an employment agreement with Respondent which, inter alia, provided that it could be terminated by either party on 30 days' notice which shall be in writing. On March 1, 1989, Respondent wrote O'Donnell that his employment was terminated effective February 10 and that he will receive 1 month's pay in lieu of contract notice.

The credited evidence establishes that O'Donnell had been the key spokesperson for the pilots with Respondent's officials regarding a broad array of subjects pertaining to their hours of work and other terms and conditions of employment. These matters were received by Respondent in the course of tense, argumentative sessions at which Respondent indicated its annoyance with O'Donnell's extensive participation and with the idea that the pilots were acting in concert. O'Donnell was summarily discharged very soon after the last session and told that he was discharged because he did not agree with Respondent as to how it ran the operation. I find, based on the above and the entire record, that the General Counsel had established a prima facie case that

O'Donnell was discharged because he had engaged in concerted activities with other pilots which were protected by the Act. See *Clark & Wilkins Industries*, 290 NLRB 106 (1988). It is now well settled that the burden of proof shifted to Respondent to demonstrate that it would have, absent O'Donnell's having engaged in protected activities under the Act, still discharged him. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 333 (1983).

Respondent presented the following evidence to support its contentions.

In early 1988, one of the pilots (Calabrese) suggested to Kemper that monthly quizzes be given to the pilots to keep them up-to-date on various procedures. Kemper adopted the suggestion and distributed written quizzes. They were not graded or used for any personnel reasons and took little time to complete. All the pilots answered the quizzes except O'Donnell who balked at more paperwork. Kemper prevailed on him to complete the quizzes by telling him to calm down and not to jeopardize his job. O'Donnell completed all the quizzes in July 1988.

Respondent placed in evidence several file memorandums, none which had ever been shown to O'Donnell. One referred to an incident that had taken place on December 17, 1985, in Quincy, Illinois. O'Donnell then had taxied his plane under power from a hanger. O'Donnell explained that towing equipment was not available and he had to leave then with his passengers before an ice storm was due to arrive.

The second memorandum, dated April 10, 1985, noted that O'Donnell had stopped over in Chicago as a passenger on a commercial flight instead of proceeding directly to Teterboro.

Another of these memorandums, one dated January 4, 1987, concerned O'Donnell's functioning as Respondent's training officer—a nonpaid assignment of which he was never relieved.

The fourth memorandum, dated July 30, 1988, had to do with the subject of monthly quizzes, discussed above.

The last, dated February 9, 1989 (the day before O'Donnell's discharge), was signed by Kemper and notes that, on two occasions in December 1988, O'Donnell did not specify alternate airports and, on another occasion in December 1988, he did not list crew assignments on charter flights. Denny testified that O'Donnell had continually violated this type of paperwork requirement.

Respondent also placed in evidence an analysis, done for the period January 1986 to December 1986, of O'Donnell's performance. His overall performance, as reported therein, was said to represent a level of quality performance expected of Respondent's employees.

Lastly, Denny had cited, in a prehearing affidavit, that O'Donnell had failed to follow flight procedures in 1984. At the hearing, Denny's testimony indicates that O'Donnell's failure to follow operational procedures then "did not come to light until after (O'Donnell's) termination went through."

There is no probative evidence that Respondent would have discharged O'Donnell on February 10, 1989, even if he had not engaged in activities protected by the Act. If anything, the evidence Respondent presented demonstrated that, prior to O'Donnell's participation in the protected activities, Respondent tolerated several of his miscues and an incident

in which he openly said he would not complete assigned quizzes. Apparently, Respondent reconsidered those matters after, and because, O'Donnell took the lead as the spokesperson for the pilots.

In any event, suffice it to note that the evidence proffered by Respondent is unpersuasive to establish that it would have, absent O'Donnell's protected activities, discharged him on February 10, 1989. While Respondent correctly argues that the Board is not to substitute its judgment for that of Respondent in matters of employee discipline, neither is the Board to accept Respondent's assertions as matters of faith.

There has to be some proof in support thereof and the evidence presented by Respondent falls far short.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act by having discharged its employee, Frank X. O'Donnell, on February 10, 1989, because he, in concert with other employees, engaged in activities protected by Section 7 of the Act.

REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be ordered to offer Frank X. O'Donnell immediate and full reinstatement to his former position of employment or, if it no longer exists to a substantially equivalent position of employment without prejudice to his seniority and other rights and privileges and to make him whole for any loss of pay or other benefits he may have suffered by reason of its having unlawfully discharged him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also remove from its records any reference to his unlawful discharge, provide him with written notice of such removal, and inform him that his unlawful discharge will not be used as a basis for future personnel actions concerning him. See *Sterling Sugars*, 261 NLRB 472 (1982).

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, American Cyanamid Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in activities protected by the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Frank X. O'Donnell full and immediate reinstatement to his former position or, if it is no longer available, to a substantially equivalent position.

(b) Make him whole for any loss of earnings or benefits that he suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of this decision.

(c) Remove from its files all references to the unlawful discharge of Frank X. O'Donnell and notify him in writing that this has been done and that his unlawful discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Teterboro, New Jersey facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employee because of their activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer full reinstatement to Frank X. O'Donnell and WE WILL make him whole with interest, for any loss of earnings and other benefits he may have suffered because of the discrimination against him.

WE WILL remove from our files any reference to his discharge and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions concerning him.

AMERICAN CYANAMID COMPANY

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."